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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 660

[Docket No. 120207106-2105-01]

RIN 0648-BB85

Magnuson-Stevens Act Provisions; Fisheries off West Coast States; Pacific Coast Groundfish Fishery; 2012 Tribal Fishery for Pacific Whiting

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Proposed rule; request for comments.

SUMMARY: NMFS issues this proposed rule for the 2012 Pacific whiting fishery under the authority of the Pacific Coast Groundfish Fishery Management Plan (FMP), the Magnuson Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act), and the Pacific Whiting Act of 2006. This proposed rule would establish a tribal allocation of 17.5 percent of the U.S. total allowable catch (TAC) for 2012.

The regulations proposed by this action would also establish a process for reapportionment of unused tribal allocation of Pacific whiting to the non-tribal fisheries.

DATES: Comments on this proposed rule must be received no later than 5 p.m., local time on [Insert date 30 days after date of publication in the FEDERAL REGISTER].

ADDRESSES: You may submit comments, identified by RIN 0648-BB85 by any of the following methods:

- Electronic Submissions: Submit all electronic public comments via the Federal eRulemaking Portal, at <http://www.regulations.gov>. To submit comments via the e-Rulemaking Portal, first click the "submit a comment" icon, then enter (RIN Number) in the keyword search. Locate the document you wish to comment on from the resulting list and click on the "Submit a Comment" icon on the right of that line.

- Fax: 206-526-6736, Attn: Kevin C. Duffy
- Mail: William W. Stelle, Jr., Regional Administrator, Northwest Region, NMFS, 7600 Sand Point Way NE, Seattle, WA 98115-0070, Attn: Kevin C. Duffy.

Instructions: All comments received are a part of the public record and will generally be posted to <http://www.regulations.gov> without change. All Personal Identifying Information (for example, name, address, etc.) voluntarily submitted by the commenter may be publicly accessible. Do not submit Confidential Business Information or otherwise sensitive or protected information.

NMFS will accept anonymous comments (if submitting comments via the Federal Rulemaking portal, enter "N/A" in the relevant required fields if you wish to remain anonymous). Attachments to electronic comments will be accepted in Microsoft Word, Excel, WordPerfect, or Adobe PDF file formats only.

FOR FURTHER INFORMATION CONTACT: Kevin C. Duffy (Northwest Region, NMFS), phone: 206-526-4743, fax: 206-526-6736 and e-mail: [kevin.duffy@noaa.gov](mailto:kevin.duffy@noaa.gov).

#### SUPPLEMENTARY INFORMATION:

##### Electronic Access

This proposed rule is accessible via the Internet at the Office of the Federal Register's Website at <http://www.gpo.gov/fdsys/search/home.action>. Background information and documents are available at the Pacific Fishery Management Council's website at <http://www.pcouncil.org/>.

##### Background

The regulations at 50 CFR 660.50(d) establish the process by which the tribes with treaty fishing rights in the area covered by the Pacific Coast Groundfish Fishery Management Plan (FMP) request new allocations or regulations specific to the tribes, in writing, during the biennial harvest specifications and management measures process. The regulations state that "the Secretary will develop tribal allocations and regulations under this paragraph in consultation with the affected tribe(s)

and, insofar as possible, with tribal consensus." These procedures employed by NOAA in implementing tribal treaty rights under the FMP, in place since May 31, 1996, were designed to provide a framework process by which NOAA Fisheries can accommodate tribal treaty rights by setting aside appropriate amounts of fish in conjunction with the Pacific Fishery Management Council (Council) process for determining harvest specifications and management measures. The Council's groundfish fisheries require a high degree of coordination among the tribal, state, and federal co-managers in order to rebuild overfished species and prevent overfishing, while allowing fishermen opportunities to sustainably harvest over 90 species of groundfish managed under the FMP.

Since 1996, NMFS has been allocating a portion of the U.S. TAC (called Optimum Yield (OY) or Annual Catch Limit (ACL) prior to 2012) of Pacific whiting to the tribal fishery following the process established in 50 CFR 660.50(d). The tribal allocation is subtracted from the U.S. Pacific whiting TAC before allocation to the non-tribal sectors.

To date, only the Makah Tribe has prosecuted a tribal fishery for Pacific whiting. The Makah Tribe has annually harvested a whiting allocation every year since 1996 using midwater trawl gear. Since 1999, the tribal allocation has been made in consideration of their participation in the fishery. In

2008 the Quileute Tribe and Quinault Indian Nation expressed an interest in commencing participation in the whiting fishery. Tribal allocations for 2009-2011 were based on discussions with all three tribes regarding their intent for those fishing years. The table below provides a history of U.S. OYs/ACLs and the annual tribal allocation in metric tons (mt).

<u>Year</u>	<u>U.S. OY</u>	<u>Tribal Allocation</u>
2000	232,000 mt	32,500 mt
2001	190,400 mt	27,500 mt
2002	129,600 mt	22,680 mt
2003	148,200 mt	25,000 mt
2004	250,000 mt	32,500 mt
2005	269,069 mt	35,000 mt
2006	269,069 mt	32,500 mt
2007	242,591 mt	35,000 mt
2008	269,545 mt	35,000 mt
2009	135,939 mt	50,000 mt
2010	193,935 mt	49,939 mt
2011	290,903 mt	66,908 mt

Prior to publication of the regulations for the 2011-2012 harvest specification biennial cycle, all three tribes mentioned above indicated their intent to participate at some point during this biennium. The Quinault Nation indicated that they were

interested in entering the fishery in 2011, and both the Quileute and Makah Tribes indicated they intended to fish in both 2011 and 2012. Only the Makah tribe participated in the fishery in 2011. Based on exchanges with the tribes during November 2011, and again in January, 2012, it appears that only the Makah tribe will participate in the Pacific whiting fishery in 2012.

Since 2008, NMFS and the co-managers, including the States of Washington and Oregon, as well as the Treaty tribes, have been involved in a process designed to determine the long-term tribal allocation for Pacific whiting. At the September 2008 Council meeting, NOAA, the states and the Quinault, Quileute, and Makah tribes met and agreed on a process in which NOAA would provide to the tribes and states of Washington and Oregon a summary of the current scientific information regarding whiting, receive comment on the information and possible analyses that might be undertaken, and then prepare analyses of the information to be used by the co-managers (affected tribes, affected states, and NMFS) in developing a tribal allocation for use in 2010 and beyond. The goal was agreement among the co-managers on a long-term tribal allocation for incorporation into the Council's planning process for the 2010 season. An additional purpose was to provide the tribes the time and information to develop an inter-tribal allocation or other

necessary management agreement. In 2009, NMFS shared a preliminary report summarizing scientific information available on the migration and distribution of Pacific whiting on the west coast. The co-managers met in 2009 and discussed this preliminary information.

In 2010, NMFS finalized the report summarizing scientific information available on the migration and distribution of Pacific whiting on the west coast. In addition, NMFS responded in writing to requests from the tribes for clarifications on the paper and requests for additional information. NMFS also met with each of the tribes in the fall of 2010 to discuss the report and to discuss a process for negotiation of the long-term tribal allocation of Pacific whiting.

In 2011, NMFS again met individually with the Makah, Quileute, and Quinault tribes to discuss these matters. Due to the detailed nature of the evaluation of the scientific information, and the need to negotiate a long-term tribal allocation following completion of the evaluation, the process is continuing and will not be completed prior to the 2012 Pacific whiting fishery; thus the tribal allocation of whiting for 2012 will not reflect a negotiated long-term tribal allocation. Instead, it is an interim allocation not intended to set precedent for future allocations.

Tribal Allocation for 2012

It is necessary to propose a range for the tribal allocation, rather than a specific allocation amount, because the specific allocation depends on the amount of the coastwide TAC (United States plus Canada) and corresponding U.S. TAC for 2012 (73.88% of the coastwide TAC). The Joint Management Committee (JMC), which is established pursuant to the Agreement between the Government of the United States of America and the Government of Canada on Pacific Hake/Whiting (the Agreement), is anticipated to recommend the coastwide and corresponding U.S./Canada TACs no later than March 25, 2012.

In the final Environmental Impact Statement (FEIS) addressing the groundfish fishery for the 2011 and 2012 harvest specifications and management measures, a range of 50 to 150 percent of the 2010 coastwide harvest level was analyzed.

The Council adopted a coastwide Overfishing Limit (OFL) of 973,700 mt for 2011 fisheries using the model-averaged results as recommended by the Council's Scientific and Statistical Committee (SSC). The Council recommended a coastwide harvest level of 393,751 mt for 2011 fisheries. Consistent with the terms of the Agreement, the U.S. allocation of the coastwide harvest level is 73.88 percent, which equated to 290,903 mt for 2011.

In order for the public to have an understanding of the potential tribal whiting allocation in 2012, NMFS is using the



range of potential TACs analyzed in the 2011 FEIS to project a range of potential tribal allocations for 2012. Application of this range for 2011 resulted in a potential U.S. TAC of between 96,969 mt and 290,903 mt.

As described above, based on exchanges with the tribes during November 2011, and more recently in January, 2012, it appears that only the Makah tribe will participate in the Pacific whiting fishery in 2012, and they have requested 17.5% of the U.S. TAC. Application of this percentage to the range of U.S. TACs results in a tribal allocation of between 16,970 and 50,908 mt for 2012. NMFS believes that the current scientific information regarding the distribution and abundance of the coastal Pacific whiting stock suggests that 17.5 percent of the U.S. TAC is within the range of the tribal treaty right to Pacific whiting.

As described earlier, NOAA Fisheries proposes this rule as an interim allocation for the 2012 tribal Pacific whiting fishery. As with past allocations, this proposed rule is not intended to establish any precedent for future whiting seasons or for the long-term tribal allocation of whiting.

The proposed rule would be implemented under authority of Section 305(d) of the Magnuson-Stevens Act, which gives the Secretary responsibility to "carry out any fishery management plan or amendment approved or prepared by him, in accordance

with the provisions of this Act." With this proposed rule, NMFS, acting on behalf of the Secretary, would ensure that the FMP is implemented in a manner consistent with treaty rights of four Northwest tribes to fish in their "usual and accustomed grounds and stations" in common with non-tribal citizens.

United States v. Washington, 384 F. Supp. 313 (W.D. 1974).

#### Reapportionment of Pacific Whiting

NMFS proposes to reinstate its regulatory authority to reapportion whiting from the tribal allocation to the non-tribal fishery when the tribes participating in the fishery will not take the entire tribal allocation during the fishing year. From 1997 through 2010, 50 CFR 660.323(c) provided authority to NMFS to undertake such reapportionment. For 2011, the regulatory provisions regarding reapportionment of tribal whiting allocation to the non-tribal fishery were eliminated when regulations implementing Amendment 21 were adopted in support of the trawl rationalization program. Revisions to the groundfish regulations at § 660.55 defined how "off the top" set-asides for all species, including the tribal allocation of Pacific whiting, would be dealt with. The new provisions did not allow flexibility to return the "off the top" set asides, including those for Pacific whiting, to other sectors of the fishery. Following implementation of the catch share program, the Council had additional discussions about reapportionment of the tribal

allocation of Pacific whiting. The Council recommended that NMFS reinstate reapportionment provisions in order to promote full utilization of the Pacific whiting resource. NMFS is taking action at this time to reinstate similar reapportionment provisions, recognizing that modifications are needed to fit within the new regulatory structure implemented for the IFQ fishery.

By September 15 of the fishing year, the Regional Administrator will consider, based on discussions with tribal representatives, the tribal harvests to date and catch projections for the remainder of the year relative to the tribal allocation as specified at § 660.50 of Pacific whiting. That portion of the tribal allocation the Regional Administrator determines will not be used by the end of the fishing year may be made available for harvest by the other sectors of the trawl fishery, on September 15 or as soon as practicable thereafter. Based on the same factors described above, the Regional Administrator may reapportion whiting again at a later date to ensure full utilization of the resource. Any reapportionment of Pacific whiting from the tribal to the non-tribal sectors will be distributed in a manner consistent with the initial allocation of Pacific whiting among the non-tribal sectors, with 34 percent to the catcher-processor sector, 24 percent to the mothership sector, and 42 percent to the shorebased sector.

Current regulations at 50 CFR 660.140(d)(3)(ii)(B)(3) require that all Quota Pounds (QP) or Individual Bycatch Quota (IBQ) pounds from a Quota Share (QS) account must be transferred to one or more vessel accounts by September 1 of each year. This effectively closes QS accounts for the year.

If the Regional Administrator makes a decision to reapportion Pacific whiting from the tribal to the non-tribal fishery after September 1 in any year, the following actions will be taken.

NMFS will credit QS accounts with additional Pacific whiting quota pounds proportionally, based on the whiting QS percent for a particular QS permit owner and the amount of the sector reapportionment. The QS account transfer function will be reactivated by NMFS for a period of 30 days to allow permit holders to transfer only Pacific whiting QP to vessel accounts. After 30 days, the transfer function in QS accounts will again be deactivated. If an additional reapportionment of Pacific whiting occurs, the same procedures will be followed.

#### Classification

NMFS has preliminarily determined that the management measures for the 2012 Pacific whiting tribal fishery are consistent with the national standards of the Magnuson-Stevens Act and other applicable laws. NMFS, in making the final

determination, will take into account the data, views, and comments received during the comment period.

The Office of Management and Budget has determined that this proposed rule is not significant for purposes of Executive Order 12866.

An IRFA was prepared, as required by section 603 of the Regulatory Flexibility Act (RFA). The IRFA describes the economic impact this proposed rule, if adopted, would have on small entities. A summary of the analysis follows. A copy of this analysis is available from NMFS (see ADDRESSES).

Under the RFA, the term "small entities" includes small businesses, small organizations, and small governmental jurisdictions. The SBA has established size criteria for all different industry sectors in the US, including fish harvesting and fish processing businesses. A business involved in fish harvesting is a small business if it is independently owned and operated and not dominant in its field of operation (including its affiliates) and if it has combined annual receipts less than \$4.0 million for all its affiliated operations worldwide. A seafood processor is a small business if it is independently owned and operated, not dominant in its field of operation, and employs 500 or fewer persons at all its affiliated operations worldwide. A business involved in both the harvesting and processing of seafood products is a small business if it meets

the \$4.0 million criterion for fish harvesting operations. A wholesale business servicing the fishing industry is a small business if it employs 100 or fewer persons at all its affiliated operations worldwide. For marinas and charter/party boats, a small business is a business with annual receipts less than \$7.0 million. For nonprofit organizations, the RFA defines a small organization as any nonprofit enterprise that is independently owned and operated and is not dominant in its field. The RFA defines small governmental jurisdictions as governments of cities, counties, towns, townships, villages, school districts, or special districts with populations of less than 50,000.

Over the past five years (2007 to 2011), the total whiting fishery (tribal and non-tribal) has averaged landings of 197,000 mt annually, worth \$36 million in terms of ex-vessel revenues. As the U.S. OY/ACL has been highly variable during this time, so have landings. During this period, landings have ranged from 121,000 mt (2009) to 248,000 mt (2008). Landings for 2011 are estimated to be about 197,000 mt. Ex-vessel revenues have also varied. Annual ex-vessel revenues have ranged from \$14 million (2009) to \$58 million (2008). Ex-vessel revenues in 2011 were about \$46 million. As landings have varied, so have prices. These prices are largely determined by the world market for groundfish as most of the whiting harvested is exported. Ex-

vessel prices have ranged from \$116 per mt (2009) to \$236 per mt (2008). Average ex-vessel price for whiting in 2011 was \$232 per mt. Note that the use of ex-vessel values does not take into account the wholesale or export value of the fishery or the costs of harvesting and processing whiting into a finished product. NMFS does not have sufficient information to make a complete assessment of these values.

The Pacific whiting fishery harvests almost exclusively Pacific whiting. While bycatch of other species occurs, the fishery is constrained by bycatch limits on key overfished species. This is a high-volume fishery with low ex-vessel prices per pound. This fishery has seasonal aspects based on the distribution of whiting off the west coast. The whiting fishery has four components. The shorebased fishery delivers their catch to processing facilities on land. Most of these vessels also deliver other groundfish species to shorebased plants. This fishery is managed under an individual fishing quota system. In the mothership sector, catcher vessels deliver to floating processors called motherships. This fishery is managed under a single mothership co-op—the Whiting Mothership Cooperative. The catcher-processor fleet consists of vessels that both catch the fish and process it aboard. This fishery is also managed under a co-op—the Pacific Whiting Conservation Cooperative.

The fourth component of the fishery is the tribal fishery. Since 1996, there has been a tribal allocation of the U.S. whiting TAC. There are three tribes associated with the whiting fishery: Makah, Quileute, and Quinault.

There are two key features of this rule making: establishing the 2012 interim tribal allocation and reinstatement of regulatory authority to reapportion whiting from the tribal to the non-tribal fishery. The alternatives are "No-Action" vs. the "Proposed Action". The proposed allocation, based on discussions with the tribes is for NMFS to allocate 17.5 percent of the U.S. total allowable catch for 2012. NMFS did not consider a broader range of alternatives to the proposed allocation. The tribal allocation is based primarily on the requests of the tribes. These requests reflect the level of participation in the fishery that will allow them to exercise their treaty right to fish for whiting. Consideration of amounts lower than the tribal requests is not appropriate in this instance. As a matter of policy, NMFS has historically supported the harvest levels requested by the tribes. Based on the information available to NMFS, the tribal request is within their tribal treaty rights, and the participating tribe has historically shown an ability to harvest the amount of whiting requested. A higher allocation would be, arguably, within the scope of the treaty right. However, a higher allocation would



unnecessarily limit the non-tribal fishery. A no action alternative was considered, but the regulatory framework provides for a tribal allocation on an annual basis only. Therefore, no action would result in no allocation of Pacific whiting to the tribal sector in 2012, which would be inconsistent with NMFS' responsibility to manage the fishery consistent with the tribes' treaty rights. Given that there is a tribal request for allocation in 2012, this alternative received no further consideration.

There are two alternatives associated with reinstating the authority to reapportion unused Pacific whiting from the tribal fishery to the non-tribal fishery. The "No-Action" alternative is the authority not reinstated. The "Proposed" Alternative would be to reinstate the authority.

NMFS has reviewed analyses of fish ticket data and limited entry permit data, available employment data provided by processors, information on Tribal fleets, and industry responses to a 2010 survey on ownership and has developed the following estimates for the whiting fishery. There are four affected components of this fishery-Shorebased whiting, mothership whiting, catcher-processor, and tribal. In the shorebased whiting fishery, quota shares of whiting were allocated to 138 entities including ten shoreside processing companies. These entities can fish the quota pounds associated with their quota

shares, transfer their quota pounds to other to fish, or choose not to fish their quota pounds. Whiting is landed as bycatch in other fisheries or as a target catch in the whiting fishery. To analyze the number of participants primarily affected by this rule making, targeted whiting trips are defined as landings that contained 5,000 pounds or more of whiting. During 2011, 62 vessels landed a total of about 200 million pounds of whiting. Of these vessels, only 26 vessels had landings greater than 5,000 pounds. Thirteen of these 26 vessels are "small" entities. These 26 vessels delivered their catch to 10 processing companies. These 10 processing companies, either through ownership or affiliation, can be organized into to 6 entities. Four of these 6 entities are "small" entities. There are 37 limited entry permits that have mothership whiting catch history assignments. During 2011, these 37 permits pooled their whiting catch history assignments into a single mothership fishery co-op. Approximately half of these vessels are "small" entities. Vessels in the mothership co-op deliver their catch to mothership processors. There are 6 mothership processing companies; three of which are "small" entities. The catcher-processor fleet has ten limited entry permits and 10 vessels, owned by three companies. These three companies are considered "large" companies mainly because of their operations off Alaska. The tribal fleet is comprised of 5 vessels considered to be

"small" entities, while the 3 tribal governments, based on population sizes, are considered "small" entities.

The expected effect of the "Proposed" alternative relative to the "No Action" alternative is to allow unharvested tribal allocations of whiting to be fished by the non-tribal fleets, benefitting both large and small entities. With the implementation of Amendments 20 and 21, the ability to reapportion whiting from tribal to the non-tribal fishery was eliminated for 2011. Pending markets, available bycatch, and the ability of tribal fleets to develop the capacity to harvest the tribal allocation there may be uncaught whiting in the tribal fishery because there is no regulatory mechanism to transfer uncaught whiting to the non-tribal fishery. For 2010, the tribes were initially allocated 49,939 mt. As tribal harvests were projected to be about 16,000 mt, in September 2010 and October 2010, NMFS reapportioned a total of 16,000 mt of whiting from the tribal allocation to the non-tribal shorebased, mothership, and catcher processor sectors. Unlike 2010, for 2011, NMFS was not authorized to reapportion unharvested tribal whiting to the non-tribal sectors. Tribal harvests as of October 7, 2011 were about 19 percent of the 66,908 mt allocation indicating that about 54,000 tons of the tribal allocation would go unfished. This rulemaking would reinstate the regulatory authority to reapportion whiting from the tribal

to the non-tribal fishery. If NMFS was authorized in 2011 to reapportion half or more of the 54,000 mt unfished tribal allocation, the ex-vessel revenues could have increased by as much as \$6.0 million.

This proposed rule would directly regulate which entities can harvest whiting. This rule would allocate fish between tribal harvesters (harvest vessels are small entities, tribes are small jurisdictions) to non-tribal harvesters (a mixture of small and large businesses). Tribal fisheries are a mixture of activities that are similar to the activities that non-tribal fisheries undertake. Tribal harvests are delivered to both shoreside plants and motherships for processing. These processing facilities also process fish harvested by non-tribal fisheries.

NMFS believes this proposed rule would not adversely affect small entities and is likely to be beneficial to both small and large entities as it allows unharvested tribal fish to be harvested by non-tribal harvesters. Nonetheless, NMFS has prepared this IRFA and is requesting comments on this conclusion.

There are no reporting, recordkeeping or other compliance requirements in the proposed rule.

No Federal rules have been identified that duplicate, overlap, or conflict with this action.

NMFS issued Biological Opinions under the ESA on August 10, 1990, November 26, 1991, August 28, 1992, September 27, 1993, May 14, 1996, and December 15, 1999 pertaining to the effects of the Pacific Coast groundfish FMP fisheries on Chinook salmon (Puget Sound, Snake River spring/summer, Snake River fall, upper Columbia River spring, lower Columbia River, upper Willamette River, Sacramento River winter, Central Valley spring, California coastal), coho salmon (Central California coastal, southern Oregon/northern California coastal), chum salmon (Hood Canal summer, Columbia River), sockeye salmon (Snake River, Ozette Lake), and steelhead (upper, middle and lower Columbia River, Snake River Basin, upper Willamette River, central California coast, California Central Valley, south/central California, northern California, southern California). These biological opinions have concluded that implementation of the FMP for the Pacific Coast groundfish fishery was not expected to jeopardize the continued existence of any endangered or threatened species under the jurisdiction of NMFS, or result in the destruction or adverse modification of critical habitat.

NMFS issued a Supplemental Biological Opinion on March 11, 2006 concluding that neither the higher observed bycatch of Chinook in the 2005 whiting fishery nor new data regarding salmon bycatch in the groundfish bottom trawl fishery required a

reconsideration of its prior ``no jeopardy'' conclusion. NMFS also reaffirmed its prior determination that implementation of the Groundfish PCGFMP is not likely to jeopardize the continued existence of any of the affected ESUs. Lower Columbia River coho (70 FR 37160, June 28, 2005) and Oregon Coastal coho (73 FR 7816, February 11, 2008) were recently relisted as threatened under the ESA. The 1999 biological opinion concluded that the bycatch of salmonids in the Pacific whiting fishery were almost entirely Chinook salmon, with little or no bycatch of coho, chum, sockeye, and steelhead.

NMFS has reinitiated consultation on the fishery to address newly listed species including Pacific eulachon and green sturgeon, and other non-salmonid listed species (marine mammals, sea birds, and turtles). NMFS will be completing a consultation on listed marine species for the 2012 groundfish fishery by the end of January 2012, and expects that consultation on seabirds will be completed prior to late summer of 2012. Further, NMFS has concluded that take of any marine species that will be covered by the opinion to be issued in early 2012 is very unlikely to occur prior to completion of that opinion, and that take of listed seabirds is unlikely to occur in 2012.

Marine Mammal Protection Act (MMPA)

Impacts resulting from fishing activities proposed in this rule are discussed in the FEIS for the 2011-12 groundfish

fishery specifications and management measures. As discussed above, NMFS does not anticipate incidental take of ESA-listed marine mammals prior to the completion of the 2012 ESA consultation covering these species. NMFS expects to complete the process leading to any necessary authorization of incidental taking under MMPA section 101(a)(5)(E) concurrent with the 2012 biological opinion.

Pursuant to Executive Order 13175, this proposed rule was developed after meaningful consultation and collaboration with tribal officials from the area covered by the FMP. Consistent with the Magnuson-Stevens Act at 16 U.S.C. 1852(b)(5), one of the voting members of the Pacific Council is a representative of an Indian tribe with federally recognized fishing rights from the area of the Council's jurisdiction. In addition, NMFS has coordinated specifically with the tribes interested in the whiting fishery regarding the issues addressed by this rule.

List of Subjects in 50 CFR Part 660

Fisheries, Fishing, Indian Fisheries.

Dated February 16, 2012

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Alan D. Risenhoover,  
Acting Deputy Assistant Administrator  
For Regulatory Programs,  
National Marine Fisheries Service.

For the reasons set out in the preamble, 50 CFR part 660 is proposed to be amended as follows:

PART 660--FISHERIES OFF WEST COAST STATES

1. The authority citation for part 660 is amended to read as follows:

Authority: 16 U.S.C. 1801 et seq. and 16 U.S.C. 773 et seq.

2. In § 660.50, paragraph (f)(4) is revised to read as follows:

§ 660.50 Pacific Coast treaty Indian fisheries.

\* \* \* \* \*

(f) \* \* \*

(4) Pacific whiting. The tribal allocation for 2012 will be 17.5 percent of the U.S. TAC.



\* \* \* \* \*

3. In § 660.60 paragraphs (d) (1) (iv), and (v) are revised and paragraphs (d) (1) (vi) and (d) (2) are added to read as follows:

§ 660.60 Specifications and management measures.

\* \* \* \* \*

(d) \* \* \*

(1) \* \* \*

(iv) Reapportionment of the unused portion of the tribal allocation of Pacific whiting to the IFQ, mothership and catcher processor Pacific whiting fisheries.

(v) Implement the Ocean Salmon Conservation Zone, described at § 660.131(c) (3), when NMFS projects the Pacific whiting fishery may take in excess of 11,000 Chinook within a calendar year.

(vi) Implement Pacific Whiting Bycatch Reduction Areas, described at § 660.131(c) (4) Subpart D, when NMFS projects a sector-specific bycatch limit will be reached before the sector's whiting allocation.

(2) Automatic actions are effective when actual notice is sent by NMFS. Actual notice to fishers and processors will be by e-mail, internet ([www.nwr.noaa.gov/Groundfish-Halibut/Groundfish-Fishery-Management/Whiting-Management/index.cfm](http://www.nwr.noaa.gov/Groundfish-Halibut/Groundfish-Fishery-Management/Whiting-Management/index.cfm)), phone, fax, letter, or press release. Allocation reapportionments will be followed by publication in

the Federal Register, in which public comment will be sought for a reasonable period of time thereafter.

4. In § 660.131 a new paragraph (h) is added to read as follows:

§ 660.131 Pacific whiting fishery management measures.

\* \* \* \* \*

(h) Reapportionment of Pacific Whiting. (1) By September 15 of the fishing year, the Regional Administrator will, based on discussions with representatives of the tribes participating in the Pacific whiting fishery for that fishing year, consider the tribal harvests to date and catch projections for the remainder of the year relative to the tribal allocation as specified at §660.50 of Pacific whiting. That portion of the tribal allocation that the Regional Administrator determines will not be used by the end of the fishing year may be reapportioned to the other sectors of the trawl fishery in proportion to their initial allocations, on September 15 or as soon as practicable thereafter. Subsequent reapportionments may be made based on subsequent determinations by the Regional Administrator based on the factors described above in order to ensure full utilization of the resource.

(2) The reapportionment of surplus whiting will be made effective immediately by actual notice under the automatic action authority provided at 660.60 (d) (1).

(3) Estimates of the portion of the tribal allocation that will not be used by the end of the fishing year will be based on the best information available to the Regional Administrator.

5. In § 660.140 paragraph (d)(1)(ii) and (d)(3)(ii)(B)(3) are revised to read as follows:

§ 660.140 Shorebased IFQ program.

\* \* \* \* \*

(d) \* \* \*

(1) \* \* \*

(ii) Annual QP and IBQ pound allocations. QP and IBQ pounds will be deposited into QS accounts annually. QS permit owners will be notified of QP deposits via the IFQ Web site and their QS account. QP and IBQ pounds will be issued to the nearest whole pound using standard rounding rules (*i.e.* , decimal amounts less than 0.5 round down and 0.5 and greater round up), except that in the first year of the Shorebased IFQ Program, issuance of QP for overfished species greater than zero but less than one pound will be rounded up to one pound. Rounding rules may affect distribution of the entire shorebased trawl allocation. NMFS will distribute such allocations to the maximum extent practicable, not to exceed the total allocation. QS permit owners must transfer their QP and IBQ pounds from their QS account to a vessel account in order for those QP and IBQ pounds to be fished. QP and IBQ pounds must be transferred in

whole pounds (i.e. , no fraction of a QP or IBQ pound can be transferred). All QP and IBQ pounds in a QS account must be transferred to a vessel account by September 1 of each year in order to be fished, unless there is a reapportionment of Pacific whiting consistent with §§ 660.131(h) and 660.140(d)(3).

\* \* \* \* \*

(3) \* \* \*

(ii) \* \* \*

(B) \* \* \*

(3) Transfer of QP or IBQ pounds from a QS account to a vessel account. QP or IBQ pounds must be transferred in whole pounds (i.e. no fraction of a QP can be transferred). QP or IBQ pounds must be transferred to a vessel account in order to be used. Transfers of QP or IBQ pounds from a QS account to a vessel account are subject to vessel accumulation limits and NMFS' approval. Once QP or IBQ pounds are transferred from a QS account to a vessel account (accepted by the transferee/vessel owner), they cannot be transferred back to a QS account and may only be transferred to another vessel account. QP or IBQ pounds may not be transferred from one QS account to another QS account. All QP or IBQ pounds from a QS account must be transferred to one or more vessel accounts by September 1 each year. If the Regional Administrator makes a decision to

reapportion Pacific whiting from the tribal to the non-tribal fishery after September 1 in any year, the following actions will be taken.

(i) NMFS will credit QS accounts with additional Pacific whiting QP proportionally, based on the whiting QS percent for a particular QS permit owner and the amount of the sector reapportionment of whiting.

(ii) The QS account transfer function will be reactivated by NMFS for a period of 30 days from the date that QS accounts are credited with additional Pacific whiting QP to allow permit holders to transfer only Pacific whiting QP to vessel accounts.

(iii) After 30 days, the transfer function in QS accounts will again be inactivated.

\* \* \* \* \*

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